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STATE OF NEW JERSEY
OFFICE OF THE ATTORNEY GENERAL
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION ON CIVIL RIGHTS
DCR DOCKET NO. EC24WB-60143
REFERRAL NO. 17E-2009-00055

CARL CARPENTER and
CHINH Q. LE, DIRECTOR,
NEW JERSEY DIVISION ON CIVIL
RIGHTS,

Complainants,

v.

CBM and VINCENT MILIO, SUPERVISOR,
INDIVIDUALLY,

Respondents.

FINDING OF PROBABLE CAUSE

Consistent with a Verified Complaint filed on September 15, 2008, the above-named respondents have been charged with unlawful discrimination within the meaning of the New Jersey Law Against Discrimination (N.J.S.A. 10:5-1, et seq.) and specifically within the meaning of N.J.S.A. 10:5-12 (a) and (d) because of race and reprisal.

Chinh Q. Le is the Director of the New Jersey Division on Civil Rights and, in the public interest, has intervened as a Complainant in this matter pursuant to N.J.A.C. 13:4-2.2(e).

SUMMARY OF COMPLAINT

Complainant alleged that Respondents subjected him to a racially hostile work environment and discharged him from his position as carpenter because of his race (Black) and reprisal. To support his claim, Complainant alleged that Respondent Vincent Milio, who was a supervisor, kept referring to him at work as "shop boy" and calling him "nigger." Complainant alleged that on July 18, 2008, he complained about this to Respondent CBM's general manager, Vincent Gianfrancesco. Complainant alleged that he was discharged on August 14, 2008, and that Respondent told him he was being discharged for doing a job incorrectly. Complainant denied that he did a job incorrectly and alleged that he was discharged in retaliation for complaining about racial harassment.

SUMMARY OF RESPONSE

Respondents denied discriminating against Complainant for any unlawful reason including race and reprisal. Respondent CBM stated that it discharged Complainant for violation of its attendance policy, asserting that Complainant received three warnings for failing to report to work

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without calling to report his absence. Respondent CBM admitted that Complainant reported racial harassment, but asserted that Complainant later agreed that Respondent Milio did not make any racial remarks.

Respondent Milio, in a separate answer to the complaint, denied calling Complainant "nigger." Respondent Milio stated that on one occasion he referred to both Complainant and himself as "just shop boys." Respondent Milio stated that Complainant was discharged because of the way he grouted walls on a job. He said that George Diaz, the person overseeing the job, told him and Gianfrancesco that *"he was disappointed in Mr. Carpenter's work performance and that it was going to take an extra night and two men to correct the work that Mr. Carpenter did."*

BACKGROUND

Respondent CBM is a construction/renovation company located in Mount Laurel, Burlington County, New Jersey.

Respondent Vincent Milio was hired by Respondent CBM on February 9, 2004, and on January 20, 2009, he was discharged.

Complainant resides in Philadelphia, Philadelphia County, Pennsylvania. Respondent hired Complainant on December 10, 2007, as a carpenter. On August 14, 2008, Respondent discharged Complainant.

Chinh Q. Le is the Director of the Division on Civil Rights and, in the public interest, has intervened as a complainant in this matter pursuant to N.J.A.C. 13:4-2.2 (e).

SUMMARY OF INVESTIGATION

This investigation revealed sufficient evidence to support a reasonable suspicion that Respondents subjected Complainant to unlawful race discrimination and reprisal.

Although Respondent Milio denied subjecting Complainant to racially hostile comments, the investigation revealed sufficient evidence to support Complainant's allegations of racial harassment. During the Division's investigation, Complainant stated that on several occasions, Respondent Milio called him "shop boy" and "nigger," and on one occasion Milio made a sarcastic remark about Complainant being unable to wipe the brown color off his face.

On July 14, 2009, the assigned investigator interviewed one of Respondent CBM's foremen, Robert Simmons. Simmons, who is Caucasian, was hired by Respondent in December 2007, and was still employed by Respondent CBM at the time of the interview. Simmons stated that he was present on two occasions when Respondent Milio made racial remarks directly to Complainant. He stated that on one occasion, he and Complainant were carrying a table and Respondent Milio said to Complainant, "wipe that brown shit off your face. Oh, you can't." Simmons said that later, maybe

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that same evening, Respondent Milio made another racially derogatory remark. Simmons stated that he could not recall that remark. Simmons said that in or around July 2008, he and Respondent Milio were in the office and Milio said to him, "*I called Carl a nigger in front of him.*"

On August 13, 2009, the investigator interviewed Cyrus Gordon. Gordon, who is Black, stated that he was employed by Respondent CBM as a supervisor/foreman from in or around January 2008, until in or around April 2009, when he resigned. Gordon stated that he heard Respondent Milio use the term "nigger" frequently while at work. Gordon stated that this made him uncomfortable, but he decided to just tolerate it because Respondent Milio was not referring to him.

At the Division's Fact Finding Conference, Complainant explained that on or about July 16, 2008, he attempted to speak to Larry Levy, President of Respondent CBM about Milio's racial harassment. Complainant stated that he was stopped by Vincent Gianfrancesco, the general manager, who told him that whatever happens in the company must be handled by him.

Gianfrancesco, who was also at the Fact Finding Conference, agreed that Complainant came to his office upset, and that he told Complainant that he would handle the situation. Respondent CBM submitted to the Division two undated typed notes regarding Complainant's report of racial harassment. One, entitled "Meeting with Carl Carpenter," appears to have been written by Gianfrancesco, and indicated that he called a meeting because Complainant reported that "*Vince Milio was mistreating him and calling him names.*" The investigation disclosed that Respondent convened a meeting on July 18, 2008 with Complainant, Respondent Milio, Gianfrancesco, and two other members of management: Steve Sabulsky, and Rich Carpenter. The other typed note, written by Steve Sabulsky, appears to summarize what happened at the meeting. The note does not give any details or explanation of Complainant's allegations of racial harassment, but merely states that Complainant expressed how he felt working for Milio, that Milio answered the accusations, and that both came to the conclusion that their comments to each other were unprofessional.

The Division's investigation disclosed that, at the July 18, 2008 meeting, Respondent Milio denied making racial remarks, and Respondent Milio told Complainant, "*If I offended you in any way, I apologize.*" During the Division's investigation, Complainant explained that Gianfrancesco interjected at that meeting, asking whether the situation could be resolved, and stating that Milio would remain employed by Respondent CBM until he decides to retire. Gianfrancesco then asked Complainant whether he was willing to stay on until retirement, and Complainant said that he would, because it was a good job. Complainant stated that he and Respondent Milio then shook hands and hugged each other.

Approximately one month after the above meeting, Complainant was discharged. Although the verified complaint in this matter alleged that Respondent told Complainant that he was being discharged because of work performance, Respondent gave a different reason for Complainant's discharge. In its answer to the verified complaint and at the Division's Fact Finding Conference, Respondent CBM stated that Complainant was discharged for violating Respondent's attendance policy, based on three incidents of "no call/no show." Respondent submitted to the Division three disciplinary action notices from Complainant's personnel file, for absences on June 29, July 27, and

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August 12, 2008. Complainant denied ever being a "no call/no show," and further denied ever receiving the disciplinary notices submitted to the Division by Respondent CBM. Although the notices have a signature line for the employee, Complainant's signature was not on any of the notices.

At the Division's Fact Finding Conference, Complainant asserted that he had never received the warning notices Respondent produced, and alleged that Respondent had created the documents after wrongfully terminating his employment. Although the Division's investigation could not confirm whether Respondent actually issued the disciplinary notices on the dates noted, the Division's review of the disciplinary notices and the accompanying weekly time sheets revealed some inconsistent dates that made them at least questionable. Moreover, Complainant asserted that he consistently followed Respondent's procedures for calling in for job assignments and reported to work whenever he had an assignment, because he often was assigned less than 40 hours of work per week, and wished to work as much as possible.

Respondent Milio submitted a separate answer to the verified complaint, giving a different reason for Complainant's discharge. Respondent Milio made no mention of Complainant being a "no call/no show." Consistent with Complainant's allegations in the verified complaint, Respondent Milio stated that Complainant was discharged for poor work performance. Milio claimed that George Diaz was overseeing a job Complainant was assigned to, and Diaz complained to him and Gianfrancesco that he was disappointed with the way Complainant grouted the walls for the project.

The investigation disclosed that the project Milio was referring to was at a job site in Paramus, New Jersey in August 2008. At the Fact Finding Conference, George Diaz asserted that he learned from Cyrus Gordon, one of the foremen at that project, that Complainant was not doing his job, took too many cigarette breaks, and improperly grouted a wall. During the Division's investigation, Complainant denied that he failed to do his job properly or took excessive breaks.

In an interview with the assigned investigator, Cyrus Gordon stated that he was one of two foremen at the job site in Paramus, New Jersey. Gordon said that he never told Diaz that Complainant was not doing his job, taking too many breaks, or that he improperly grouted a wall. Gordon said that most of the walls were "messed up" and no one person was responsible for a particular wall. Gordon said that Complainant performed his job satisfactorily, and that other employees who did not perform satisfactorily were retained.

Further investigation revealed that Respondent CBM gave the Division inaccurate information regarding the reasons for some of its other employees' separation from employment. In response to the Division's information request, Respondent CBM claimed that it discharged eight employees for the same reason as Complainant: "no call/no show." The Division investigator interviewed three of these individuals: Joseph A. Previch, Mike Dolan, and Jack Kratzer. Each of these former employees denied being discharged for being "no call/no show." Previch stated that he resigned. Dolan stated he was laid off due to lack of work. Kratzer stated that he was discharged because he told Respondent Milio that he could not go on a road trip, as he could not arrange for child care on such short notice.

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In addition, Respondent CBM advised the Division that Respondent Milio was let go due to lack of work. In an interview with the Division investigator, however, Milio stated that Respondent CBM told him that he was being discharged because of Complainant's racial harassment complaint, and never mentioned anything about lack of work in relation to his discharge.

The Division's investigation also disclosed that Respondent's written policy on harassment did not clearly inform its employees of the procedures for reporting racially hostile comments in the workplace. Although the first sentence of that policy makes it clear that Respondent will not tolerate any type of harassment, including racial harassment, the remainder of the policy addresses sexual harassment in particular, and Respondent's only mention of procedures for reporting harassment are specifically identified as procedures for reporting sexual harassment. Moreover, the investigation disclosed that Respondent failed to even follow the procedures it outlined for addressing sexual harassment complaints, as it did not investigate Complainant's allegations in a confidential manner, but instead called Complainant to directly confront the person he accused of racial harassment, and did so in a meeting with three other members of Respondent's management.

ANALYSIS

At the conclusion of the investigation, the Division is required to make a determination whether "probable cause" exists to credit a complainant's allegation of discrimination. Probable cause has been described under the New Jersey Law Against Discrimination (LAD) as a reasonable ground for suspicion supported by facts and circumstances strong enough to warrant a cautious person to believe that the law was violated and that the matter should proceed to hearing. Frank v. Ivy Club, 228 N.J. Super. 40,56 (App. Div.1988), rev'd on other grounds, 120 N.J. 73 (1990), cert. den., 111 S. Ct. 799. A finding of probable cause is not an adjudication on the merits but, rather, an "initial culling-out process" whereby the Division makes a preliminary determination of whether further Division action is warranted. Sprague v. Glassboro State College, 161 N.J. Super. 218,226 (App. Div.1978). See also Frank v. Ivy Club, supra, 228 N.J. Super. at 56. In making this decision, the Division must consider whether, after applying the applicable legal standard, sufficient evidence exists to support a colorable claim of discrimination under the LAD.

Here, the investigation disclosed that Complainant's supervisor subjected him to racially derogatory comments that were sufficiently severe or pervasive that a reasonable Black employee would find that his work environment had become hostile and abusive. In addition to Complainant's own evidence, the Division's investigation disclosed corroborating evidence from two of Respondent CBM's foremen, Cyrus Gordon and Robert Simmons, to support Complainant's allegations that Milio subjected him to racial harassment. The investigation further disclosed that Respondent CBM failed to take prompt, effective remedial action once it knew or should have known of the racially hostile work environment. As Respondent Milio was Complainant's supervisor, Respondent CBM is liable for Milio's unlawful conduct. Moreover, Respondent CBM failed to implement or disseminate effective policies and procedures to prevent and eliminate racial harassment, failed to provide effective procedures for its employees to report such harassment, and failed to properly investigate

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and remedy Complainant's report of racial harassment.

The investigation further disclosed that, several weeks after Complainant reported the racial harassment, Respondent CBM discharged him. The reason articulated by Respondent CBM for discharging Complainant differed from the reason articulated by Respondent Milio. The investigation disclosed evidence to contradict both articulated reasons, and the evidence gathered supported Complainant's position that Respondents' articulated reasons for his discharge were pretextual and that the actual reason was reprisal for reporting Respondent Milio's racial harassment.

The investigation further disclosed sufficient evidence to support a reasonable suspicion that Respondent Milio can be held individually liable for his own conduct in making racially hostile comments to a subordinate employee, and in retaliating against Complainant for reporting his racial harassment.

FINDING OF PROBABLE CAUSE

It is, therefore, determined and found that Probable Cause exists to credit the allegations of the complaint.

09/25/09
Date


Chinh Q. Le, Director
New Jersey Division on Civil Rights

STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
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CARL CARPENTER,
COMPLAINANT,

-vs-

C.B.M., AND VINCENT MILIO,
SUPERVISOR, INDIVIDUALLY,
RESPONDENTS.

AMENDED VERIFIED COMPLAINT

Received and Recorded

Date:

Department of Law and Public Safety
Division on Civil Rights

I, Chinh Q. Le, Esq., Director of the New Jersey Division on Civil Rights, hereby intervene as a Complainant in the above referenced matter pursuant to N. J. A. C. 13:4-2.2 (e) and hereby amend the caption of the Verified Complainant, received and filed on September 15, 2008, to read as follows:


CARL CARPENTER, AND
CHINH Q. LE, ESQ, DIRECTOR
DIVISION ON CIVIL RIGHTS,

COMPLAINANTS,

-vs-

C.B.M., AND VINCENT MILIO,
SUPERVISOR, INDIVIDUALLY,


RESPONDENTS.



CHINH Q. LE, ESQ., DIRECTOR
DIVISION ON CIVIL RIGHTS

Sworn to and subscribed before me

on this 25th day of September, 2009.


NOTARY PUBLIC OF NEW JERSEY

LEONA DRAUGHN
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires 11/01/2012